Supreme Court, U. S.
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# SINGLE APPENDIX

IN THE

## Supreme Court of the United States

October Term, 1973

No. 73-717

ALEXANDER J. ANTOINE and IRENE F. ANTOINE, *his wife*,
*Appellants*,

v.

THE STATE OF WASHINGTON,
*Respondent*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

AUGUST 1974

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# RELEVANT DOCKET ENTRIES

Title of Case:

ALEXANDER J. ANTOINE and IRENE F. ANTOINE, *his wife*, *Appellants*,

v.

THE STATE OF WASHINGTON
*Respondent*.

| Date | Proceedings | Single Appendix Page No. |
|---|---|---|
| 1971 | | |
| Sept. 11 | Appellants cited by State of Washington Game Protector. | (not included) |
| Oct. 18 | Appellants tried in Ferry County District Court. | (not included) |
| Nov. 1 | Judgment of guilty announced by Ferry County District Court. | (not included) |
| Nov. 9 | Notice of Appeal to the Superior Court of the State of Washington for Ferry County filed. | (not included) |
| 1972 | | |
| Jan. 14 | Trial of appellants in Superior Court and oral opinion of the court finding appellants guilt. | (not included) |
| May 18 | Judgment and sentence of trial court filed. | 15 |
| Aug. 9 | Findings of Fact and Conclusions of Law of trial court filed. | 12 |
| May 18 | Notice of Appeal to Washington Supreme Court filed. | (not included) |

| Date | Proceedings | Single Appendix Page No. |
|---|---|---|
| 1973 | | |
| July 12 | Opinion of the Washington State Supreme Court upholding appellant's conviction. | 18 |
| Aug. 14 | Remittitur issued by Washington Supreme Court making judgment of the Washington Supreme Court final as of August 13, 1973. | 36 |
| Sept. 19 | Notice of Appeal to the U.S. Supreme Court filed. | (not included) |
| Oct. 31 | Jurisdictional statement and case filed and case docketed with the U.S. Supreme Court. | (not included) |
| 1974 | | |
| June 17 | Probable juridiction noted by the U.S. Supreme Court. | (not included) |



## Executive Order Dated July 2, 1872

EXECUTIVE MANSION

Washington, July 2, 1872

It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein named by Executive order of April 9, 1872, be restored to the public domain, and that in lieu thereof the country bounded on the east and south by the Columbia River on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

U.S. GRANT

# 1891 AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION

(Defendant's Exhibit No. 4)

Articles of Agreement—made and entered into on the 9th day of May A.D. 1891 at the Colville Indian Reservation in the State of Washington by Mark A. Fullerton, W. H. H. Dufur and James F. Payne Commissioners on the part of The United States appointed for the purpose, and The Indians residing on said reservation.

*Article 1*

The said Colville Indians residing and having their homes on the said Colville Indian Reservation upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their rights, title, claim and interest in and to and over the following described tract of Country on the Colville Indian Reservation in the State of Washington, viz.

Beginning at a point on the Eastern boundary line of the Colville Indian Reservation where the township line between townships 34 & 35 North of Range 37 East of the Willamette Meridian if extended West would intersect the same, said point being in the middle of the Channel of the Columbia River, and running thence West parallel with the forty ninth (49) parallel of latitude to the Western boundary line of the said Colville Indian Reservation in the Okanogan River, thence North following the said Western boundary line to the said forty ninth (49) parallel of latitude, thence East along the said forty ninth (49) parallel of latitude to the North East corner of the said Colville Indian Reservation, thence South following the Eastern boundary of said reservation to the place of beginning con-



taining by estimation one million five hundred thousand acres, the same being a portion of the Colville Indian Reservation created by Executive order dated April 9th, 1872.

*Article 2*

Each and every Indian now residing upon the portion of the Colville Indian Reservation hereby ceded and relinquished and who is so entitled to reside thereon shall be entitled to select from said ceded portion Eighty acres of land which shall be allotted to such Indian in severalty. No restrictions as to locality shall be placed upon such selections other than that they shall be so located as to conform to the Congressional survey or sub-divisions of said tract or country, and any Indian having improvements may have the preference over any other person in and to the tract of land containing such improvements so far as they are within a legal sub-division not exceeding in area the quantity of land that he or she may be entitled to select and locate. All such allotments shall be made at the cost of the United States under such rules and regulations as The Secretary of the Interior may from time to time prescribe.

*Article 3*

All Indians residing in the lands hereby ceded and relinquished shall have the right if they so prefer under the direction of the Indian Agent to occupy and reside on such portions of the Colville Indian Reservation not hereby ceded as are not occupied by or in the possession of any other Indian or Indians.

*Article 4*

Whereas the lands used and occupied for School purposes at what is known as the Tonasket School on Buona-

parte Creek on said reservation have been ceded and relinquished to the United States, it is agreed and stipulated that in lieu thereof the United States will provide for a School site and school purposes a tract of land conveniently and desirably located upon the Colville Indian Reservation hereby ceded to contain Six Hundred and forty acres and upon the same at the cost of the United States, will erect suitable buildings for an Indian School and in all respects provide for the conduct, equipment and maintenance thereof as Indian Schools are now provided for, it being expressly understood and agreed that no part of the purchase money hereinafter mentioned of the lands hereby ceded is to be employed or expended in the erection of school buildings or in the maintenance of Indian Schools upon said Reservation. And it is further stipulated that in lieu of the Saw Mill, Grist Mill and other Mill property hereby ceded, the United States will provide a suitable and convenient Mill Site and will thereon at its own cost erect suitable buildings and place all necessary fixtures.

*Article 5*

That in consideration of the cession surrender and relinquishment to the United States of all the title, claim, rights, estate and interest of said Indians in and to the tract of land above described, the United States will pay to the said Indians, the beneficiaries of this agreement, to be distributed per capita, the sum of One Million Five Hundred Thousand Dollars payable in five annual installments of Three Hundred Thousand Dollars each, with interest thereon at five per centum after this agreement shall take effect.

In all such payments each and every Indian aforesaid



over the age of Eighteen years shall receive and receipt for his or her share of said purchase money as the same becomes due and payable, and with respect to the share of each and every Indian aforesaid who shall be under Eighteen years of age, the same shall be invested under the direction of the Secretary of the Interior for the benefit of such Indians at a rate of interest not less than five per centum per annum, and the interest thereof with so much of the principal as may be deemed necessary and proper, shall be paid annually to the father of such Indian so entitled and under the age of Eighteen years, if living, and if such father be dead, then the same shall be paid to the mother, if living, and in the event the said mother be dead, then the same shall be paid to the Indian Agent of the Colville Reservation for the use and maintenance of such orphan, and when such minors shall attain their majority, their shares in such purchase money, or so much thereof as may remain unpaid, shall be paid over to them together with any interest that may be due thereon.

*Article 6*

It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limitations prescribed by law, to taxation for any purpose, national, state or municipal; that said Indians shall enjoy without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.

*Article 7*

It is agreed that the United States at its own cost, will erect on the Colville Indian Reservation not ceded at some point suitable and convenient to the Indians who may elect to remain upon the portion of the Reservation hereby ceded and have allotments set apart thereon as hereby stipulated, a blacksmith shop and furnish same with suitable tools and implements and employ a competent blacksmith for the benefit of said Indians.

*Article 8*

And whereas it is believed that many of the Indians above the age of Eighteen years residing and having their homes upon the said Colville Reservation are well advanced in industrial pursuits and economical training and possess habits so well formed as to warrant an early payment to such Indians of their shares in the purchase money of the lands hereby ceded and relinquished, it is therefore specially agreed and stipulated that the United States will pay in two equal annual installments with interest the shares of all such Indians above eighteen years of age in said purchase money who will furnish to The Secretary of the Interior a certificate in due form from the Indian Agent on said Colville Reservation to the effect that such Indian or Indians are of good character, of sober and industrious habits and are suitable persons to entrust with the expenditure of money.

*Article 9*

It is stipulated and provided that such male adult Indians upon the Colville Reservation as do not on account of absence or for any other cause sign this agreement, shall



upon receiving their shares in said purchase money, execute and file with the Indian Agent on said Colville Reservation a brief relinquishment releasing to the United States all their right, title, interest and estate in and to the lands hereby ceded.

And it is further stipulated that in the event any of said Indians shall after reasonable notice given, fail, neglect, refuse or decline to receive and receipt for their shares in said purchase money, then and in all such cases under such rules and regulations as the Secretary of the Interior may prescribe, the share or shares of such Indians which are not claimed or called for, shall become common property of all Indians in said Reservation who conform to this agreement and they shall share and share alike therein.

*Article 10*

At the request of said Indians it is agreed and stipulated that the school site referred to in Article 4 of this agreement shall be located upon that portion of the lands hereby ceded which the Indians interested in said school may select. The Saw Mill and Grist Mill referred to in said Article 4 shall be located upon that part of said Reservation not ceded at such point as will be convenient to the Indians electing to remain on the ceded part of Reservation.

*Article 11*

That in further consideration of the said cession and relinquishment of the tract of land set forth and particularly described in this agreement, to the United States by said Indians and their Chiefs or head-men, and upon the understanding that said Chiefs and their people will faithfully perform this agreement, the United States in addition to

the purchase money aforesaid will pay to Moses Chief of The Columbia Tribe of Indians the sum of One Thousand Five Hundred Dollars in cash, to Joseph Chief of the Nez Perces tribe the sum of One Thousand dollars in cash, to Barnaby Chief of the Colville tribe the sum of one thousand Dollars in cash, to Antoine Chief of the Okanogan tribe the sum of one thousand Dollars in cash, and to Aripaughin Chief of the Lake tribe the sum of one thousand Dollars in cash, from and after the notification and approval of this agreement by Congress at which time the same will go into effect.

*Article 12*

This agreement shall go into effect from and after its approval by Congress.

Witness our hands and seals the day and year first above written.

MARK A. FULLERTON, *Commissioner*
W. H. H. DUFUR, *Commissioner*
JAMES F. PAYNE, *Commissioner*

Antoine Chief Okanogans his X mark

• • •

[Balance of signatures, approximately 575 individuals, chiefs and sub-chiefs, is deleted.]

• • •

Signed, sealed and delivered in the presence of

HAL J. COLE
S. P. SHMIDT
E. C. THOMAS

I , Robert Flett, U.S. Indian Interpreter, for the Colville Indian Agency do hereby certify, on honor that the foregoing agreement was carefully read and by me correctly



interpreted and that the contents thereof were freely explained to, and fully understood by said Indians before the signing and sealing of the same.

Witness
A. M. ANDERSON /s/ROBERT FLETT

SUPERIOR COURT FOR FERRY COUNTY
(TRIAL COURT)
FINDINGS OF FACT AND CONCLUSIONS OF LAW

| | |
|---|---|
| STATE OF WASHINGTON, *Plaintiff,*<br>v.<br>ALEXANDER J. ANTOINE, and IRENE F. ANTOINE, his wife, *Defendants.* | No. 4859<br>Findings of Fact and Conclusions of Law |

THIS MATTER, having come on regularly before the undersigned judge, the court having heard the stipulation of counsel concerning the facts of the case, and having listened to oral arguments of MR. LARRY CONIFF, Deputy Attorney General for the State of Washington, and MR. MASON D. MORISSET, general counsel for defendant herein, now makes the following

## FINDINGS OF FACT

1. On Setpember 1, 1971, defendant Alexander Antoine, was engaged in the activity of hunting for deer in Ferry County, Washington, within the exterior boundaries of the original Colville Indian Reservation as established by the President of the United States by Executive Order in 1872.

2. On September 11, 1971, defendant, Alexander Antoine, did also have in his possession a game animal, to-wit: a deer.

3. At the time of such hunting and possession, *i.e.*, September 11, 1971, hunting season was closed for deer in this particular area within Ferry County.



4. Defendant, Alexander Antoine, is a duly-enrolled member of the Confederated Tribes of the Colville Reservation.

5. The action herein complained of, *i.e.*, hunting and possession of a deer in closed season, occurred outside the exterior boundary of the Colville Indian Reservation as it presently exists.

6. The land on which the deer was shot was non-trust, unallotted, non-Indian owned land.

7. In 1891 the United States entered into an agreement with the Confederated Tribes of the Colville Reservation, entered in this cause as defendant's Exhibit 4, which contains the following language in Article VI:

> ". . . the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged."

FROM THE FOREGOING, the court makes the following:

## CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and subject matter of this action.

2. The Colville Indians and defendant herein are bound by the 1891 agreement with the United States Government which gave the Indians the right to hunt and fish in common with all others. This means that defendant is bound by the State conservation laws as all others are bound.

3. Having shot and been in possession of a deer during closed season, defendant is guilty of taking a deer out of season in violation of RCW 77.16.020 and guilty of unlaw-

ful possession of a deer in closed season in violation of RCW 77.16.030.

DONE IN OPEN COURT this 27th day of July, 1972.

/s/ RICHARD J. ENNIS
*Judge*

Presented by:

PROSECUTING ATTORNEY
FOR FERRY COUNTY
/s/ GRANVILLE EGAN

Copy Received and Approved
for Entry:

ATTORNEY GENERAL OF
STATE OF WASHINGTON
/s/ LARRY CONIFF
*Deputy Attorney General*

Copy Received and Notice of
Presentation Waived:

ZIONTZ, PIRTLE & MORISSET
/s/ MASON D. MORISSET
*Attorneys for Defendants*



## JUDGMENT OF TRIAL COURT

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FERRY

| | |
|---|---|
| STATE OF WASHINGTON, *Plaintiff,* v. ALEXANDER J ANTOINE, and IRENE J. ANTOINE, his wife, *Defendants.* | No. 4859 Judgment and Sentence [Filed 5/18/72] |

This matter coming on regularly for hearing before the undersigned on the 14th day of January 1972, the defendants Alexander and Irene Antoine, appearing in person and with their attorney Mason D. Morisset of Ziontz, Pirtle and Morisset of Seattle; the defendants having been charged with violations of RCW 77.16.020; 77.16.030; and RCW 77.16.050, committed 11 September 1971, and were tried in District Court No. 1, Ferry County, Washington, to all of which charges defendants pleaded Not Guilty in this Court after a prior finding of Guilty in the District Court: and Appeal having been made hereto, and Trial having been had in this Court, Witnesses having been sworn and evidence introduced by the State of Washington, and on behalf of the defendants, and argument having been made, and,

It APPEARING this Court found the defendants Guilty of violating RCW 77.16.020 and 77.16.030, and that, on the motion of the State the charge of violating RCW 77.16.050, was dismissed and

It APPEARING that the District Court sentenced Alexander Antoine to 30 days with 25 days suspended, plus one year probation, and the defendant Irene Antoine 30 days, suspended, with one year probation, and

It APPEARING THAT each defendant personally, their attorney, Mason D. Morisset, and the Assistant Attorney General and the Prosecuting Attorney all have stipulated in writing filed in this Court that such sentence of the District Court was reasonable under the particular circumstances, and each would agree that the same sentence be the sentence of the Hon. Richard J. Ennis, the Trial Judge herein, and

It APPEARING that the defendants have waived their right to be present at the signing of the sentence in this case. NOW THEREFORE

It is hereby ORDERED, ADJUDGED and DECREED that the defendants Alexander J. Antoine and Irene F. Antoine is each guilty of violation RCW 77.16.020, (hunting during closed season), it is further

ORDERED, ADJUDGED and DECREED that the defendant Alexander J. Antoine shall be confined in the County jail of Ferry County for 30 days, with 25 days thereof suspended, and is placed on probation to this Court for a period of one year from the entry of this Judgment,

It is further ORDERED that the defendant Irene F. Antoine shall be confined in the Ferry County Jail for 30 days, suspended, and shall be placed on probation to this Court for a period of one year from date of the filing of this Judgment.

During the period of their probation each defendant



shall be under the custody of the Sheriff of Ferry County, and shall make such reports and obey such reasonable rules as he shall direct.

Done in open Court this 16th day of May, 1972.

/s/ RICHARD J. ENNIS
*Judge*

Presented by:
/s/ GRANVILLE EGAN
*Prosecuting Attorney for Ferry County*

## OPINION OF WASHINGTON SUPREME COURT FILED 7/12/73

## IN THE SUPREME COURT OF THE STATE OF WASHINGTON

| | |
|---|---|
| THE STATE OF WASHINGTON *Respondent,* v. ALEXANDER J. ANTOINE, and IRENE J. ANTOINE, his wife, *Appellants.* | No. 42420 EN BANC Filed July 12, 1973 |

The appellants were charged in superior court with the offenses of hunting during closed season (RCW 77.16.020) and possession of deer during closed season (RCW 77.16.-030). The offenses occurred on unallotted nonIndian land in what was once the north half of the Colville Indian Reservation. By way of defense, the appellants asserted that they were not subject to the state's game protection laws, immunity from such laws having allegedly been promised them by the United States government under the terms of an agreement signed by agents of the government and by members of their Indian tribe in 1891. The trial court held that the agreement was not intended to afford such immunity from state laws, and entered judgment and sentence, from which this appeal has been taken.

The appellant husband is an enrolled member of the Confederated Tribes of the Colville Reservation, and it is not questioned that he and his wife are beneficiaries of the agreement in question, which was executed when the Indians residing on the reservation, for a stated price, ceded their right of occupancy and use of the northern half of



the reservation to the United States, owner of the fee.[1] Under the terms of the agreement certain lands in the ceded portion were to be allotted to Indians then residing on the northern half. A school and a millsite and buildings were to be provided on the ceded lands.

Article 6 of the agreement stated:

> It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limitations prescribed by law, to taxation for any purpose, national, state or municipal;[2] that said Indians shall enjoy without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the right to hunt and fish in common

1. The Colville Reservation was created by executive order on July 2, 1872. 1 Kappler 915-916.

> It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation of this government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated.

*Spalding v. Chandler*, 160 U.S. 394, 402, 40 L. Ed. 469, 16 S. Ct. 360 (1896).

2. Const. art. 26, Compact with the United States, provided that the state should impose no taxes on lands or property belonging to the United States, with the proviso:

> That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

> with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.

It is upon the final clause of this article that the appellants place their reliance. It is their theory that, before the northern half of the reservation was ceded under the terms of this agreement, their ancestors had the exclusive, absolute, and unrestricted right to hunt and fish upon the entire reservation, and that it was this right which the agreement was intended to preserve. The appellants do not claim to have succeeded to the interest of an allotment Indian, but it is their assumption that this provision was intended to guarantee to all the Indians on the reservation —and not just to the allotment Indians—the right to hunt on the ceded half. The state does not dispute this interpretation.

We think a plausible argument could be made that this clause, like all the other clauses in this article, was intended to guarantee to the allotment Indians the right to hunt and fish upon the southern half of the reservation, inasmuch as they would no longer be living on the reservation proper and might have their right to hunt there questioned, if it was not clarified in the agreement. Also, since it was contemplated that the unallotted lands in the ceded portion of the reservation would be opened to settlement,[3]

3. "By the act of July 1, 1892, c. 140, 27 Stat. 62, a specified tract or portion of the reservation—with certain exceptions—was 'vacated and restored to the public domain' and it was provided that this tract should be open to settlement and entry by the proclamation of the President and should be disposed of under the general laws applicable to the disposition of public lands in the State of Washington. The exceptions were made by Congress in order to care for the Indians residing on that portion of the reservation." *United States v. Pelican*, 232 U.S. 442, 445, 58 L. Ed. 676, 34 S. Ct. 396 (1914).



and it was reasonably to be foreseen that the settlers might fence their land and exclude the Indians and others from hunting thereon, the allotment Indians might have no place to hunt, outside their individual allotments, unless they could hunt upon the reservation.

However, since the state has not seen fit to adopt or argue this theory and since we also find merit in the theory which the state does advance, we do not rest our decision here upon that possible interpretation of the agreement. It is the state's position that the federal government was not authorized to curtail the states' right to exercise its police power, in this contractual agreement, and that it did not purport to do so.

The appellants, on the other hand, while acknowledging that the instrument in question is in fact a contract and that the executive branch was not authorized to make treaties with the Indians at the time the agreement was entered into,[4] nevertheless insist that the agreement should be given the full force and effect of a treaty—in other words, that it constitutes the supreme law of the land—and further maintain that the plain import of its words is that the right to hunt and fish on the ceded and unallotted lands should never be subject to state regulation.

We cannot agree with the proposition that there is no significant difference between a contract and a treaty. A

4. *See* Act of March 3, 1871, ch. 120, Rev. Stat. § 2079: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

treaty is defined in Black's Law Dictionary (4th rev. ed. 1968), citing *Edye v. Robertson*, 112 U.S. 580, 28 L. Ed. 798, 5 S. Ct. 247 (1884); *Ex parte Oritz*, 100 F. 955 (C.C.D., Minn. 1900); and *Charlton v. Kelly*, 229 U.S. 447, 57 L. Ed. 1274, 33 S. Ct. 945, 46 L.R.A. (n.s.) 397 (1912), as follows:

> An agreement, league or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns or the supreme power of each state.

A treaty must be entered into with the advice and consent of the senate and must be ratified by two-thirds of the senators present. U.S. Const. art. 2, § 2. Once ratified, a treaty becomes the supreme law of the land. U.S. Const. art. 6. A treaty which deals with a matter of national and international concern may contain provisions, binding upon the states, which the Congress, without such treaty, would have no power to enact. *Missouri v. Holland*, 252 U.S. 416, 64 L. Ed. 641, 40 S. Ct. 382 (1920). States are forbidden to enter into treaties. U.S. Const. art 1, § 10.

A contract, on the other hand, can be enforced only against those party to it. *McIntyre v. Johnson*, 66 Wash. 567, 120 P. 92 (1912). *See* 17 Am. Jur.2d *Contracts* §§ 1, 15 (1964). A state is bound by contracts executed in its behalf by its duly authorized agents, provided the contract does not contravene the constitution and does not divest the state of its essential attributes of sovereignty or its governmental powers. 81 C.J.S. *States* §§ 112-13 (1953). 49 Am. Jur. *States, Territories, and Dependencies* § 62 (1943). But before a contract liability can be imposed



upon a state, there must be a contractual obligation on its part.

The United States, as a body politic, and as an incident of its sovereignty, may enter into contracts, express or implied, appropriate to the just exercise of its constitutional powers, if not prohibited by law, even though there is no special statute authorizing the government to contract. 91 C.J.S. *United States* §§ 81-82 (1955).

There is no argument by the state that the contract between the United States and the Indians of the Confederated Tribes was made without authority. The appellants, on the other hand, do not suggest that the state was a party to the contract or that the agents of the federal government who negotiated and signed the contract were authorized to act on behalf of the state.

Did the parties nevertheless intend that the state should be considered a party to this agreement?

Looking to the terms of the agreement, we find that the promises made by the federal government, setting aside for the moment the clause relating to hunting and fishing rights, were all undertakings which it was within the power of the federal government to perform. These included the payment of a stated sum for the ceded land, the allotment of certain lands to the Indians living on the north half of the reservation, the setting aside of sites and the building and maintenance of schools and other structures on the ceded land, the guarantee of water rights on the allotted land, and the exemption from taxation of the allotted land "within the limitations prescribed by law."

The latter provision is the only one in the agreement

which makes any reference to state or local government, and the provision itself is in harmony with article 26 of the constitution of the state of Washington. In making this promise, then, the United States did not purport to invade any reserved power of the state but merely set forth in the agreement a right which was already guaranteed under the state constitution.

Thus, nowhere in the agreement did the federal government purport to act on behalf of the state of Washington or to cede any of its jurisdiction. The state itself could not have lawfully made such a cession had it been a party to the agreement. Yet the appellants earnestly contend that the court must read into the language promising the continuation of hunting and fishing rights a promise that the state of Washington would not exercise its right, under the police power, to regulate hunting upon those ceded lands which were to become a part of the public domain.

It was implicitly recognized by the United States Supreme Court in *United States v. Pelican*, 232 U.S. 442, 58 L. Ed. 676, 34 S. Ct. 396 (1914), the lands within the public domain which are not subject to the exclusive jurisdiction of the feleral government are subject to the jurisdiction of the state. In that case, the defendant charged with a crime under federal law, took the position that he was not subject to federal jurisdiction because the crime was not committed on the Colville reservation but rather was committed on allotted lands located outside the diminished reservation.

In holding that the allotted lands were Indian country and therefore subject to federal jurisdiction, the Supreme Court took cognizance of the fact that Congress in the act



of July 1, 1892, c. 140, 27 Stat. 62, vacated and restored to the public domain a certain portion of the reservation (that portion upon which the offenses charged in this action occurred), to be disposed of under the general laws applicable to the disposition of public lands in the state of Washington.[5] The court also recognized that upon the expiration of the trust period, the allottees were, according to the terms of the act of Congress, to become subject to and to have the benefit of the laws, both civil and criminal, of the state.[6]

It is evident that Congress was aware that the ceded and unallotted lands when opened for settlement, if not before, would come under the jurisdiction of the state. In fact, the appellants do not question the state's power to regulate

5. *See also State ex rel. Adams v. Superior Court*, 57 Wn.2d 181, 356 P.2d 985 (1960). Another situation involving the question of federal jurisdiction was before the court in *Ryan v. State*, 188 Wash. 115, 61 P.2d 1276 (1936), where we held that the federal government can secure exclusive jurisdiction over lands purchased within a state only if the state cedes such jurisdiction pursuant to article 1, section 8 of the constitution of the United States, providing that such jurisdiction can be ceded if the land is to be used for certain enumerated purposes. Lands set aside by the federal government for Indian reservations, either through treaty or by executive order, are also under the jurisdiction of the United States by reason of the power of the federal government to regulate Indian affairs. *See* 41 Am. Jur.2d *Indians* § 50 (1968). That power appears not to have been granted by any express provision of the constitution, but has never been denied.

6. *See Matter of Heff*, 197 U.S. 488, 509, 49 L. Ed. 848, 25 S. Ct. 506 (1905), where the court said: "We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject of the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control thus created cannot be set aside at the instance of the Government without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

the taking of game on the land in question; they claim only to be exempt from the operation of the game laws by virtue of the terms of the agreement of 1891. It is their theory that the rights promised them under the agreement must include immunity from state regulation, else they were promised nothing which they would not have had without the agreement.

As stated before, the appellants assert that, before the cession of the northern half of the reservation, they had the exclusive right to hunt thereon, unconstrained by state game regulations, and that it was the intent of the agreement to preserve this right on the ceded land. They acknowledge that the hunting rights on the reservation were subject to federal regulation at the time of the treaty and declare that they are subject to such regulation off the reservation, although they cite no legal authority for this proposition.[7]

Counsel also conceded in oral argument that the present owners of land in the northern half of the reservation have the right to fence their land and exclude hunters. Nevertheless they maintain that state regulation of the right to hunt is an abridgment of that right, within the meaning of the language as it was used in the contract.

According to the appellants' theory, then, the party who

7. *See* 35 Am. Jur. 2d *Fish & Game* § 32 (1967), stating the general rule to be that the federal government has no power, aside from the power to enact statutes to carry out treaties respecting migratory birds (*Missouri v. Holland*, 252 U.S. 416, 64 L. Ed. 641, 40 S. Ct. 382 (1920)), to prescribe regulations for the protection of fish and game while within the boundaries of a state. In *Hunt v. United States*, 278 U.S. 96, 73 L. Ed. 200, 49 S. Ct. 38 (1928), however, it was held that the United States might exercise the proprietary right, on its own property, to kill game out of season for the purpose of protecting its game reserve.



executed the contract—the United States—has the right to abridge their hunting rights by regulating them, and its successors in interest have a right to abridge them by excluding hunters from their land; but the state, which was not a party to the agreement and authorized no promise to be made on its behalf, cannot exercise its power and duty to protect its game, because that would amount to an unauthorized abridgment.

We think that if it was contemplated that regulation of hunting rights would constitute an abridgment of those rights, the federal government would have agreed to exempt the Indians' rights from regulation. But it is not contended that it did so either expressly or impliedly. On the other hand, if it was thought that state regulation but not federal regulation would constitute an abridgment, an express provision to that effect should have been inserted, but only after the consent of the state had been sought and obtained.

Since the parties admittedly contemplated that the Indians' hunting rights would remain subject to regulation, it follows that regulation is not ipso facto an abridgment. We think the reasonable understanding of the parties must have been that the United States, as proprietor of the land, would not abridge the Indians' hunting and fishing rights.

Taking into account the fact that the federal government had no authority to and did not purport to act on behalf of the state or to commit it to release a portion of its sovereign powers, and the additional fact that all other provisions of the agreement were of the kind which were appropriate to such an agreement and within the power of the parties to perform, we are led to conclude that the

parties intended their contract to embrace only matters which were within their control.

Whether the intent was to guarantee to the allotment Indians the right to hunt on other ceded lands as long as the white man and other Indians were allowed to hunt there, and on the southern half of the reservation with their fellow Indians—a promise which the parties could fulfill—or whether it was the intent to guarantee to all the Indians of the tribe the right to hunt upon the unallotted lands in the ceded half, we think the language "in common with all other persons" was not without significance. It was known that the government intended to open these lands to settlement, that this was its purpose in acquiring them. This meant that proprietary rights would be exercised, that the lands might be fenced and hunters excluded. Under these circumstances, it was a reasonable undertaking for the purchaser of the land to agree to see to it that, as long as it held the land and allowed others to hunt thereon, the members of the tribe also should be allowed to hunt there.

The theory that the language of this agreement was intended to preserve the hunting and fishing rights intact, just as they had existed prior to the cession of the lands, cannot be reconciled with the fact of cession of all the Indians' "rights, titles, claim and interest" in the lands and the appellants do not contend that the language was meant to limit those words of cession. Such an interpretation would place a heavy encumbrance upon the title of every settler or purchaser.

Significantly, we find in the statutes authorizing the allotment of lands (act of Feb. 8, 1887, ch. 119, 24 Stat. 388), appropriating money for the purchase of the Indians' rights



(act of June 21, 1906, Pub. L. No. 59-258, ch. 3504, 34 Stat. 325), and opening the unallotted land for settlement (act of July 1, 1892, ch. 140, 27 Stat. 62), no reference to the reservation of hunting and fishing rights. Other provisions of the agreement can be found reflected in these statutes, but upon the question of hunting and fishing, the statutes are silent.

Are we to assume that, by omitting these provisions from the enabling statutes, the United States Congress intended to disregard a contractual undertaking on the part of its duly authorized commissioners? Research reveals no clue to the omission, but we assume that the government of the United States acted in good faith and that, according to its understanding of the import of the terms, they were not intended to encumber the titles of settlers and purchasers or to impose restrictions upon the exercise of the police power by the state. Rather, we assume, it was thought that the undertaking on the part of the government was that of a proprietor and that the agreement could be performed within the normal functioning of the executive department.

There is expressed in these statutes an intent that the settlers and purchasers of the unallotted lands should take the title to the land unencumbered by restrictions in favor of those who had formerly enjoyed the right to occupy and use the land. They also manifest an intent that the Indians to whom land was allotted should receive their patents in due course and become citizens of the state, subject to all of its laws and entitled to receive their benefits. It is not in harmony with this expressed intent to assume that the Congress intended at the same time to grant to those

Indians and to the Indians remaining on the reservation an immunity from the state's game regulation laws, assuming that it was within its power to grant such immunity. Such an intent cannot be found, either express or implied, in the statutes and it is not manifested in the agreement.

We are of the opinion that the trial court correctly construed the agreement of 1891, and that it was not the intent to guarantee to the Indians immunity from the laws of the state when hunting off the reservation.

We have no quarrel with the appellants' authorities, interpreting and giving force to Indian treaties. Such treaties are binding upon the states under the supremacy clause. U.S. Const. art. 6. As the United States Supreme Court said in *United States v. Winans*, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1905), a state takes jurisdiction over its territory, when it is admitted to statehood, subject to the provisions of treaties adopted for purposes appropriate to the objects for which the United States held the territory prior to statehood. The agreement before us in this case is not a treaty and it was not signed before statehood. It is not the supreme law of the land. The statutes enacted by Congress in implementation of this agreement, which are the supreme law if they are within the power of the Congress to enact, make no reference to the provision relied upon by the appellants.

Even though it is bound by the provisions of a treaty, a state is not denied the right to enforce against the Indians its reasonable regulations for the preservation of fish. *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1968). It would be anomalous indeed if the court were to hold that the state can be



deprived of its power to regulate the taking of game through the execution of a contract to which it was not a party, but could not be so deprived by the execution of a treaty admittedly within the power of the federal government to sign, which is declared by the constitution to be the supreme law of the land. We do not, however, reach the question whether this can be done by contract, since it is our conclusion that it was not intended to be done in this case.

Our view of the proper interpretation of this agreement is in harmony with the principles which have guided the courts in deciding questions which involve an alleged conflict between the exercise of federal and state powers. The United States Supreme Court said in *South Carolina v. United States*, 199 U.S. 437, 448, 50 L. Ed. 261, 26 S. Ct. 110 (1905):

> We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty.

This principle was recognized by the Supreme Court in *Dick v. United States*, 208 U.S. 340, 52 L. Ed. 520, 28 S. Ct. 399 (1908), a case strongly relied upon by the appellants. There, the defendant was prosecuted under the federal laws prohibiting the introduction of intoxicating liquor

into Indian country. The violation occurred on land which had been ceded by the Nez Perce Indians to the United States. Under the terms of the agreement, the lands ceded and allotted were to remain subject to the protection of the federal laws prohibiting the introduction of liquor into the Indian country. The court upheld the agreement.

Insofar as the opinion in that case reveals, the state of Idaho was not a party to the action. It was not contended that the federal laws were in conflict with or superseded state laws; rather the defense was that the federal government did not have jurisdiction over this offense, because exclusive jurisdiction resided in the state. The court held, in the exercise of its constitutional power to regulate commerce with the Indians, the federal government might enforce an agreement of this kind for a reasonable period of time—in that case, 25 years. The court said:

> In determining the extent of the power of Congress to regulate commerce with the Indian tribes, we are confronted by certain principles that are deemed fundamental in our governmental system. One is that a State, upon its admission into the Union, is thereafter upon an equal footing with every other State and has full and complete jurisdiction over all persons and things within its limits, except as it may be restrained by the provisions of the Federal Constitution or by its own constitution. Another general principle, based on the express words of the Constitution, is that Congress has power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of any State within whose limits are Indian tribes. These fundamental principles are of equal dignity, and neither must be so enforced as to nullify or substantially impair the other. In regulating commerce with Indian tribes Congress must have regard to the general authority which the State has over all persons and things within its jurisdiction. So, the authority of the State cannot be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes.



208 U.S. at 353.

Inasmuch as no conflict between the agreement and existing state law was found in that case, the court found it possible to give effect to the agreement without infringing upon the jurisdiction of the state. The case differs from this in several important aspects. In the first place the question before the court was not one of interpretation, the language of the agreement being unambiguous and the only question being, was it enforceable? The state was not a party to the action and did not claim that enforcement of the agreement would interfere with the exercise of its police power. Further, the agreement was made in the exercise of a constitutional power of the federal government—that of regulating commerce with the Indian tribes. That the hunting of game is not commerce has been long settled. *Geer v. Connecticut*, 161 U.S. 519, 40 L. Ed. 793, 16 S. Ct. 600 (1896). Another significant difference is that the duration of the agreement in that case was only 25 years, whereas here the agreement is not limited as to time. The reasonableness of the period of time covered by the agreement, as well as the absence of any conflict with state laws, were factors to which the court appears to have given substantial weight in sustaining it.

The statement of the court in *Dick* which is applicable here is that which is found in the quoted paragraph—that in performing their proper functions, each of the two governments, federal and state, must have regard to the proper functioning and jurisdiction of the other and that neither of these must be allowed to nullify the other.

It is a fundamental principle of which the court was undoubtedly aware in the *Dick* case, that the power of a state

to govern man and things will not be lightly stricken down by implication, and an unexpressed purpose of Congress to set aside statutes of states regulating their internal affairs is not lightly to be inferred and ought not to be applied where the legislative command, read in the light of its history, remains ambiguous. The intention of Congress to exclude the states from exercising their reserved powers must be clearly manifested. If it is claimed that a federal act conflicts with a state act, it must be clear that the federal provisions are inconsistent with those of the state in order to justify the thwarting of state regulation. *Kelly* v. *Washington ex rel. Foss Co.*, 302 U.S. 1, 82 L. Ed. 3, 58 S. Ct. 87 (1937); *California* v. *Zook* 336 U.S. 725, 93 L. Ed. 1005, 69 S. Ct. 841 (1949); 81 C.J.S. *States* § 7, pp. 886-87 (1953).

This rule applies, of course, where both the federal and state governments are acting within their proper jurisdiction and it applies to acts of Congress, the supreme law of the land. If these are the governing principles when the court is viewing laws of such dignity, they are all the more forceful where the court is asked to hold that the federal government, in a contract to which the state was not a party and to which it did not give its consent, has undertaken to bind the state to renounce one of the powers which it is bound to exercise for the common welfare.

We are convinced that our interpretation of the agreement of 1891 gives full effect to the proper objectives and intentions of the parties, while preserving to the state the right to exercise its police power in an area properly within its jurisdiction.



The judgment is affirmed.

We concur:

HALE, C. J. /s/ ROSSELLINI, J.

FINLEY, J. STAFFORD, J.

HAMILTON, J. BRACHTENBACH, J.

No. 42420

UTTER, J. (concurring in part)—I concur in that portion of the opinion which construes article 6 to guarantee allotment Indians the right to hunt and fish upon the southern half of the reservation.

/s/ UTTER, J.
I Concur
WRIGHT, J.

Remittitur of Washington Supreme Court to Trial Court

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

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|---|---|
| THE STATE OF WASHINGTON, *Respondent,* v. ALEXANDER J. ANTOINE, and IRENE J. ANTOINE, his wife, *Appellants.* | REMITTITUR No. 42420<br>Ferry County No. 4859 |

The State of Washington to: The Superior Court of the State of Washington in and for Ferry County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on July 12, 1973, became the final judgment of this court in the above entitled case on August 13, 1973. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows: No cost bill having been filed, costs are deemed waived.

cc. MR. MASON D. MORISSET
HONORABLE GRANVILLE EGAN
Reports Office

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 14th day of August, A.D. 1973.

WILLIAM M. LOWRY
*Clerk of the Supreme Court,*
*State of Washington*

[SEAL]